Supreme Court of the United States

No. 729.

OCTOBER TERM, 1945.

HARRY THEIS, WYLLYS K. BLISS AND W. L. HAGER, NOT INDIVIDUALLY BUT AS THE BONDHOLDERS' PROTECTIVE COMMITTEE IN THE MATTER OF CERTAIN BONDS OF GRAND RIVER DRAINAGE DISTRICT OF LIVINGSTON AND LINN COUNTIES, MISSOURI, THE ORIGINAL PETITIONER, AND EVERT G. CULLING, GLENN B. SCHAFFNER AND B. F. BARNHART, THE (PROPOSED) INTERVENERS,
PETITIONERS,
VS.
DURWARD BELMONT LUTHER, ALLEGED BANKRUPT, RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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STATEMENT OF THE CASE

We deem petitioners' statement decidedly argumentative and insufficient in certain respects and, therefore, submit the following on behalf of respondent.*

*Figures in parentheses refer to pages of the printed record except where otherwise indicated.

The matter before this Court is the opinion of the United States Circuit Court of Appeals for the Eighth Circuit (221 to 226), 151 F. 2d 397, which affirms an order (179, 184) of the District Court of the United States for the Western District of Missouri, affirming the order (59) of the Referee in Bankruptcy dismissing the involuntary petition in bankruptcy filed by the Committee and affirming the order (160) of the Referee sustaining the respondent's motion to strike the Committee's motion for a new trial (60), also his motion to strike the joint motion (63) of the Committee and Interveners Culling and Schaffner, and also his motion to strike the joint motion (73) of the Committee and Intervener Barnhart to vacate and set aside order of dismissal and to grant said Interveners leave to intervene and join in the second amended petition of the Committee.

On *July 27, 1944,* the Committee, as the sole petitioning creditor, filed an involuntary petition in bankruptcy (6) against respondent alleging that respondent's creditors were less than twelve in number. (Respondent will not refer to the other allegations of this petition now since they are incorporated in a second amended petition to which reference is made later.) On *August 7, 1944,* respondent filed his answer to said petition (11) in which, after praying for the dismissal of the petition for jurisdictional reasons and because it failed to state a claim upon which relief could be granted; he stated that he had more than twelve creditors and attached thereto a list showing the names, addresses, amounts owing to each and the security if any held by each (there were 22 unsecured creditors with claims varying in amounts from $6 to $7,000); denied any indebtedness to the Committee; stated that he was a farmer deriving the principal part of his income from the operation of a 917-acre farm in Ellis

County, Texas; denied the alleged acts of bankruptcy; denied that he was insolvent and attached to his answer a list of assets (27) totalling $193,400. On *August 9, 1944,* the Referee in Bankruptcy gave notice (29) to each of the creditors listed in respondent's answer advising them of the pendency of the proceedings and stating that a hearing would be had on August 21, 1944, "to the end that all parties in interest shall have an opportunity to be heard," and stating that the petition would be dismissed if at that time a sufficient number of qualified creditors did not join with the Committee's petition. On *August 21, 1944,* no additional creditors joined with the involuntary petition (53). On *August 21, 1944,* the Committee filed its first amended petition (211); on *August 31, 1944,* respondent filed his motion (217) praying for the dismissal of said proceedings and for an order dismissing said amended petition; on *September 15, 1944,* the Committee filed its second amended petition (30) *alleging* that respondent owed debts in excess of $1,000, that he was not a wage earner or a farmer, that he had less than 12 creditors, that the Committee had 4 claims against respondent, being (a) a promissory note for $22,243.75, (b) money collected as interest and principal on certain notes amounting to $3,527.70, (c) money collected as the proceeds of the sale of certain lands amounting to $19,272 and (d) money collected by respondent for the use of the Committee from the sale of 12 tracts of land and retained by respondent as "Unjust Enrichment" $15,819*; that these claims were "discovered" (42) August 25, 1944, September 5, 1944, and September 8, 1944; that respondent committed certain acts of bankruptcy; that respondent employed by Committee to acquire for it the title to certain lands at a

*This claim represents 12 transactions exactly like the claims of Interveners except as to the names, the amounts, and the description of the properties.

foreclosure sale of drainage tax liens and was instructed to ascertain the highest and best prices at which he could sell said lands, to negotiate and consummate the sale of said lands, to pay over the proceeds of the sale of said lands to the Committee "and otherwise act for the Committee in the liquidation of said lands." On *September 18, 1944*, respondent filed his answer to said second amended petition (42), again praying for the dismissal of the petition for jurisdictional reasons and because it failed to state a claim upon which relief could be granted, he denied any indebtedness to the Committee, stated he was a farmer, denied that his creditors were less than 12 and attached the same list of creditors (22 were unsecured), denied the alleged acts of bankruptcy and denied the claim of insolvency and attached the same list of *assets*. On *October 4, 1944*, the Referee entered his decree (59) in which he found that respondent's creditors were more than 12 in number and dismissed the second amended petition and the bankruptcy proceedings in accordance with his opinion (52) sustaining respondent's motion to dismiss Committee's petition and second amended petition. On *October 13, 1944*, the Committee filed a motion for new trial (60); on *October 13, 1944*, a joint motion of Interveners Culling and Schaffner and the Committee (63) was filed, asking the Referee to set aside the order of dismissal and to grant said Interveners leave to intervene and join with Committee's second amended petition. The proposed petitions of the Interveners were attached as exhibits to the motion (66, 69) and stated that because of certain alleged fraudulent representations by respondent in connection with written contracts for the purchase of certain lands from the Committee respondent was indebted to them. These claims were identical with the 12 items of the fourth claim of the Committee's second

amended petition except as to names and amounts and the description of the lands. The same attorneys represented the Committee and the proposed Interveners. On *October 26, 1944,* a joint motion of Intervener Barnhart and the Committee (73) was filed; this motion was exactly like the immediately preceding motion except as to names and amounts and description of the land. On *October 30, 1944,* respondent filed his motion (80) to strike the Committee's motion for a new trial from the files or in the alternative to overrule said motion; respondent also filed his motion (82) to strike from the files the two joint motions of the Committee and the three Interveners. On *November 3, 1944,* Intervener Schaffner filed an affidavit (85) concerning his claims, to which was attached certain photostatic copies of contracts for the sale of lands and in which the affiant claims the second page was rewritten and substituted and that as a result he was required to pay more for the land than he offered to pay. No statement is made in the affidavit or by the Committee in its second amended petition as to when or by whom the pages were exchanged. Intervener Culling filed a similar affidavit (111); Barnhart's affidavit is shown at (135). On *December 4, 1944,* the Referee in Bankrupcty entered his decree (160) in which he found that Interveners Culling, Schaffner and Barnhart were not creditors of respondent and sustained respondent's motion to strike the Committee's motion for a new trial from the files, also sustaining respondent's motion to strike the two joint motions of the Committee and the three Interveners, to vacate the order of dismissal and for leave to intervene and join with Committee's second amended petition. Said decree was in conformity with the Referee's opinion (155) holding that Interveners were not creditors of respondent, that the Interveners got the

land they offered to buy and for the price they agreed to pay and that they got all that they bargained for according to the contracts which they signed; that if respondent owed anyone on the claims alleged by Interveners it was the Committee and not the Interveners. On *December 13, 1944*, the Committee and Interveners filed their joint petition to review the Referee's order dated December 4, 1944 (162), and the Committee filed its petition to review the Referee's orders of October 4, 1944, and December 4, 1944 (69).

On *April 12, 1945*, Judge Albert L. Reeves, Judge of the District Court of the United States for the Western Division of the Western District of Missouri, entered his decree (184) holding that the Referee in Bankruptcy properly dismissed the involuntary petitions in bankruptcy for the reasons and upon the grounds stated in his order and said orders of the Referee and each of them were in all things confirmed. The decree was in accordance with the Judge's memorandum opinion (179) holding that, *first*, respondent had more than 12 creditors, and, *second*, that Interveners were not creditors of respondent.

Petitioners appealed from the judgment of the District Court to the United States Circuit Court of Appeals for the Eighth Circuit. On *October 29, 1945*, the Circuit Court of Appeals filed its opinion and entered judgment (221 to 226) affirming in all respects the several orders and the judgment of dismissal of the District Court. On *November 13, 1945*, petitioners filed their petition for a rehearing (227) which was denied *December 5, 1945* (261). On *December 14, 1945*, the Court of Appeals stayed the mandate for thirty days pending the disposition of petitioners' application for a writ of certiorari (261).

SUMMARY OF THE ARGUMENT.

The bankruptcy proceedings were properly dismissed because (A) The involuntary petition was filed by only one alleged creditor and respondent had more than 12 creditors; (B) The interveners are not creditors of respondent; (C) There never has been a valid petition in bankruptcy on file or a valid proceeding in bankruptcy in which intervention could be filed.

ARGUMENT.

THE BANKRUPTCY PROCEEDINGS WERE PROPERLY DISMISSED BECAUSE:

(A) The involuntary petition was filed by only one alleged creditor and respondent had more than 12 creditors.

Two simple legal questions are involved.

(1) Where an involuntary petition in bankruptcy filed by only one alleged creditor claims that the alleged bankrupt had fewer than 12 creditors, *are creditors whose claims are "small in amount, current claims, payable at stated intervals" to be counted in determining how many creditors must join in the involuntary petition?*

(2) Where it is alleged that the respondent as the petitioners' trustee and agent received interveners' offers to purchase petitioners' land, the amount of which offers was voluntarily paid by interveners, and the title to which land was received by interveners and has never been questioned; and that the respondent was unjustly enriched by pocketing the difference between the price which interveners offered and did pay, and the price which he represented to petitioners as having received, *do the alleged interveners thereby have provable claims against respondent so as to permit them to be counted with petitioners in determining whether three or more creditors were seeking involuntary bankruptcy proceedings against respondent.*

Certainly these questions are not *special* or *important* enough for the Supreme Court of the United States to take jurisdiction. Both questions have been decided many times by many different courts and with but few excep-

tions,* have been decided uniformly in favor of respondent's positions here. There are no appellate court decisions to the contrary.

The original petition filed by the Committee stated:

> "Your petitioners are informed and believe that and therefore represent that all the creditors of said Durward Belmont Luther are less than 12 in number."

In due time respondent filed his answer in which he denied that he had less than 12 creditors and filed therewith under oath a list of 22 unsecured creditors showing their names and addresses and the amounts owing to each and a statement of the nature of the claims.

Section 59(d) of the Bankruptcy Act provides:

> "(d) If it be averred in the petition that the creditors of the bankrupt, computed as provided in subdivision (e) of this section, are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses and a brief statement of the nature of their claims and the amounts thereof, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that the parties in interest shall have an opportunity to be heard. If, upon such hearing, it shall appear that a sufficient number of qualified creditors have joined in such petition or, if prior to or during such hearing, a sufficient number of qualified creditors shall join therein, the case may

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*In re Blount, (D. C.) 142 Fed. 263.
In re Burg, (D. C.) 245 Fed. 173.
In re Branche, (D. C.) 275 Fed. 555.

be proceeded with, but otherwise it shall be dismissed."

Accordingly, on *August 9, 1944,* a notice was duly mailed, by the Referee in Bankruptcy, to each of said creditors advising them of the pendency and nature of the petition and that the hearing on the petition would be delayed for a reasonable time so that the parties in interest would have an opportunity to be heard. The notice (29) provided in part as follows:

> "Therefore, the Court as required by law, has caused all such creditors to be notified of the pendency of such petition and has delayed the hearing upon said petition for a reasonable time until Monday, August 21, 1944, at eleven o'clock in the forenoon, 426 U. S. Court House, Kansas City, Missouri, to the end that all parties in interest shall have opportunity to be heard.
>
> If upon such hearing, at said time, it shall appear that a sufficient number of qualified creditors have joined in such petition or, if prior to or during such hearing, a sufficient number of qualified creditors shall join therein, the case may be proceeded with, but otherwise it shall be dismissed."

On *August 21, 1944,* the date indicated in the notice for the hearing, none of said creditors had joined in the petition, and none joined that day. However, on this same day the petitioning creditor, over the objection and exception of respondent, was granted leave to file a first amended petition. Respondent duly filed his motion to strike said amended petition and to dismiss these proceedings. On *September 14, 1944,* the petitioning creditor, over the objection and exception of respondent, filed a second amended petition.

In all of said petitions substantially the same allegation is made, that is, that respondent's creditors are less

than 12 in number. No other creditor has ever joined in the petitions. This particular issue remains the same and these proceedings under the law must be dismissed unless, as contended by the Committee, the creditors listed by respondent are insufficient in number because some are for small amounts.

The word "creditor" is defined in Section 1 (11) of the Act as follows:

> "(11) 'Creditor' shall include anyone who owns a debt, demand, or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy."

It will be noted that there is no limitation as to the amount of the claim nor the consideration therefor. Provable claims, debts which may be proved, are set out in Section 103 of the Act. There is no provision in this section which designates the amount of the claim nor the nature thereof, nor that claims for current expenses usually paid at stated times, shall be excluded and cannot be proved.

Section 59(e) of the Bankruptcy Act is as follows:

> "(e) In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, there shall not be counted (1) such creditors as were employed by the bankrupt at the time of the filing of the petition; (2) creditors who are relatives of the bankrupt or, if the bankrupt is a corporation, creditors who are stockholders or members, officers or members of the board of directors or trustees or of other similar controlling bodies of such bankrupt corporation; (3) creditors who have participated, directly or indirectly, in the act of bankruptcy charged in the petition; (4) secured creditors whose claims are fully secured;

and (5) creditors who have received preferences, liens, or transfers void or voidable under this Act."

Section 59(e) of the Bankruptcy Act of 1898 is as follows:

"(e) In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted."

Section 59(d) of the Bankruptcy Act is in part as follows:

"(d) If it be averred in the petition that the creditors of the bankrupt, computed as provided in subdivision e of this section, are less than twelve in number, and less than three creditors have joined as petitioners therein, * * *."

From the foregoing quotations, it is clear that Congress intended that subdivision (e), *supra*, should be the sole basis of computation in determining the number of creditors.

That Congress considered small creditors is shown by the fact that it limited their right to vote at creditors' meetings. Section 56(c) of the Chandler Act is an entirely new section. It provides:

"(c) Claims of $50 or less shall not be counted in computing the number of creditors voting or present at creditors' meetings, but shall be counted in computing the amount (July 1, 1898, 30 Stat. at L. 544, Ch. 541, Sec. 56; June 22, 1938, 54 Stat. at L. 802, Ch. 575. Sec. 1 (11 U. S. C. A., Sec. 92).)"

Nevertheless, Congress did *not* exclude small claims in counting the number which must join in an involuntary petition. The Congress could easily have included such an exception in Section 59(e), but since it did not do so, it can be safely assumed that it did not intend that the Act should contain this exception as stated by Referee Bundschu (56):

> "* * * however, Congress did not see fit to specifically place a limitation on small creditors in computing the number of creditors of a bankrupt for determining how many creditors must join in an involuntary petition under Section 59, subdivision e. Therefore it is rational to conclude that had Congress any intention of eliminating or restricting the right to count such small creditors under that section it would have spoken on the subject. By its silence Congress left that subject where it was before the Bankrupt Act of 1938 was passed."

We submit, therefore, that in view of the plain and unambiguous language of the statute that the petitioning creditors should not be permitted under the guise of construction to include in the Act a clause clearly not intended by the Congress. To do so, we respectfully submit, would amount to judicial legislation.

We refer the court to the case of *Winkleman* v. *Ogami*, (C. C. A. 9) 123 F. 2d 78. In discussing this section of the Act the court stated, l. c. 80:

> "We see no persuasive reason for engrafting extra-statutory limitations on those provisions of the Chandler Act which prescribe the qualifications of petitioning creditors, *since terms having elsewhere in the law a well defined meaning were deliberately used*" (Emphasis ours).

Our attention has been called to the cases of *In re Blount*, (D. C.) 142 Fed. 263; *In re Burg*, (D. C.) 245 Fed.

173, and *In re Branche,* (D. C.) 275 Fed. 555; it being contended that these cases support the Committee's theory that creditors having small claims are not to be counted in determining the number of creditors who must join in the petition. In the *Blount* case the bankrupt fraudulently kept the claims alive in order to prevent a single creditor from filing a petition against him and as stated in the case of *In re Alden,* 2 F. 2d 61, the *Burg* and *Branche* cases "followed the Blount case, without noticing the fraud involved therein."

Judge Lowell states further on in the opinion in the *Alden* case in discussing the *Blount, Burg* and *Branche* cases, l. c. 61, 62:

> "With due deference to the learned judges who have decided these cases, they do not commend themselves to my judgment. Doubtless it would be convenient to disregard the bills of the butcher, the baker, and the candlestick maker as beneath the dignity of the bankruptcy court, but I find in the Act no authority for such a course.
>
> In the case at bar there is no intimation that any claims were kept alive in order to prevent a creditor from bringing his petition against the bankrupt. * * *"

See also *In re Hall,* 27 F. 2d 999. In this case the same contention as that now made by the Committee was raised, namely, that creditors having small claims should not be counted. But Judge Gibson held that they should be counted. The court stated, l. c. 999, 1000:

> "Gibson, District Judge. On February 15, 1928, a petition in bankruptcy was filed against Theodore G. Hall by Lloyd Hill, who alleged that the creditors of Hall were less than 12 in number. Subsequently the matter was referred to the referee of Bedford County as special master, to take testimony and report thereon to the court. The special master, after taking

testimony, reported that the creditors of Theodore G. Hall numbered 18, but of this number 3 were relatives and were not to be considered under the statute. Another creditor was fully secured, and also was to be excluded. Of the 14 remaining creditors, 3 had small claims against the alleged bankrupt, which the referee, as special master, reported should not be counted in making up the number of the creditors of the alleged bankrupt. These creditors were Mrs. Martha Huff, who had owing to her $8 for room rent, which was payable February 1, 1928; James V. Fisher, who had due him $5 for cigars furnished bankrupt in 1927; and Mrs. Amy Stapleton to whom bankrupt was indebted in the amount of $20 for boarding, which was due January 31, 1928.

* * * * * * *

Congress, in the exercise of its judgment, has determined that a petition in bankruptcy may be filed by one creditor, where the creditors number less than 12; and it has determined that, where the creditors are in excess of 12 in number, 3 creditors must unite in the petition before the petition in bankruptcy is effective. *It has not limited the creditors to merchandise creditors, and we find no warrant in law for the rejection of any bona fide provable claim in bankruptcy.* So far as appears by the testimony, each one of the three claims rejected by the referee are actual existing debts of Hall, and should be included. The claim of C. T. Benner, perhaps, should have been rejected, as he was the holder of a preference by legal proceedings; but, if the three rejected claims are to be included, the exclusion of his claim would still leave the actual creditors 13 in number, more than the statutory number on which the petition depends.

An order must be drawn for the dismissal of the petition" (Emphasis ours).

However, the question was finally resolved against petitioners' contention by the Eighth Circuit Court of

Appeals in the case of *Grigsby-Grunow* v. *Hieb Radio Supply Co.*, 71 F. 2d 113. Here again the same contentions were made. The court stated, l. c. 114:

> "(3) Complaint is made as to the action of the trial court in finding that the total number of the creditors of the alleged bankrupt is more than twelve. Among the creditors eliminated by the special master and included by the trial court are ten whose respective claims are small in amount, and evidently bills for current expenses. The special master found that these ten claims should not be counted as creditors in the determination of the sufficiency of the petition, for the reason that the several claims 'are accounts that are expected to be paid monthly.' There is nothing in the record to indicate that any of the ten claims in question are fictitious or fraudulent in any way, but it is the contention of appellant that it is the purpose and intention of the Bankruptcy Act to effect an equitable distribution of the assets of the insolvent debtor among all of its creditors and prevent preference, and that it is the duty of the courts to carry the intention of the law into effect, and that to permit a debtor to obtain the dismissal of an involuntary petition by including in his list of creditors holders of current claims, small in amount, payable at stated intervals, operates to defeat the real spirit and intent of the bankruptcy law. *However persuasive this argument may be, it is one which might more properly be addressed to the Congress than to the court.* The entire procedure is regulated by statute, and is covered by Section 59b of the Bankruptcy Act (U. S. C. A., Title 11, Sec. 95(b)), which reads as follows: '(b) Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to $500 or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.' *The language of*

this statute is plain and free from ambiguity, and to read into it that which is contended for by appellant would be nothing less than judicial legislation.

The holder of each of the ten claims under discussion was a creditor of the alleged bankrupt at the time the petition was filed, and, allowing for all proper deductions from the list of creditors set forth in the answer, the record clearly shows the number of creditors to be in excess of twelve, and the trial court committed no error in dismissing the petition.

The order appealed from is therefore affirmed" (Emphasis ours).

We call the court's attention to the fact that Section 59(b) of the Bankruptcy Act, on which the court in the *Grigsby-Grunow* case based its opinion, is the same today as it was at the time that case was decided except that the words *fixed as to liability and liquidated as to amount* have been added after the words "provable claims" in the first line.

See, also, *In re Murray,* 14 Fed. Supp. 146. All of the foregoing decisions are cited in the opinion and the court finally stated, l. c. 147:

"Thus it appears from the more recent cases and from the only Circuit Court of Appeals cases found and the better view is that the small running account claims should be counted as of the date the petition is filed, because no exception has been made with regard to them and they are claims provable in bankruptcy.

The report of the special master must be confirmed and it is so ordered."

Counsel for the petitioners argue that if the rules *Inclusio unius est exclusio alterius* and *de minimis non curat lex* were applied here, small creditors would not be counted. As to this argument Judge Reeves stated in his opinion (181):

> "It will be noted that the statute indicates what creditors shall not be counted. By proper construction under the rule, '*Inclusio unius est exclusio alterius,*' other creditors would be counted. The very fact that the items are small would not warrant their exclusion, nor neither would their exclusion be warranted under the rule *de minimis non curat lex.* There are cases where the latter doctrine is properly applicable in bankruptcy but (no) in a case of this character."

See, also, *In re Myron M. Navison Shoe Co.,* (D. C.) 33 F. 2d 1007, and *Myron M. Navison Shoe Co.* v. *Lane Shoe Co.,* (C. C. A. 1) 36 F. 2d 454. In these cases creditors with small claims were counted in determining the number of creditors, and the Court of Appeals ordered the petition dismissed.

Petitioners do not suggest the minimum amount of claims which should be counted and below which minimum they should not be counted. It is readily seen that if petitioners' contention should be sustained it would result in many different standards, each depending upon the opinion of the judge to whom the question should be presented.

At page 40 of petitioners' brief, they quote from the report to Congress on the Chandler Act with reference to Section 59(e). The report states "the amendment follows the authorities and is simply declarative of the case made law." This can give no comfort to the petitioners because the case made law must be found in the decisions of the Circuit Court of Appeals, such as *Grigsby-Grunow* v. *Hieb Radio Supply Co., supra, Navison Shoe Co.* v. *Lane Shoe Co., supra,* and district court cases, such as *In re Alden, supra; In re Hall, supra,* and *In re Murray, supra,* and not in the earlier district court cases.

Petitioners have cited the case of *Leighton* v. *Kennedy,* (C. C. A. 1, 1904) 129 Fed. 737, 739, for the proposition that creditors having small claims should not be counted, and that, therefore, it is in conflict with the opinion in this case (petition for writ of certiorari p. 8). We respectfully submit that this is not the holding in the Leighton case. The facts as shown by a stipulation filed in the case were these. An assignee in an assignment for the benefit of creditors purchased with funds of the assigned estate several claims against the alleged bankrupt 16 days before the petition in bankruptcy was filed, and 4 days before the petition in bankruptcy was filed, l. c. 738:

> " 'The twelve accounts assigned as aforesaid to Martin were, on March 24, 1903, assigned by said Martin to twelve different persons, who respectively paid to Martin for the several accounts the same amount that Martin had paid for the respective accounts.'
>
> 'The purpose of Martin and his assignees in making and taking these assignments of March 24, 1903, from Martin, was to keep claims enough alive to prevent a single creditor from maintaining a creditor's petition in bankruptcy against said Albert Leighton, and to prevent these claims from merging in himself, and to exclude the possibility of his being counted as only one creditor in case of bankruptcy proceedings against said Leighton.' "

The court held, l. c. 739 and 740:

> "* * * To the time when the petition in bankruptcy was filed Leighton had not repudiated them; so that, for this case, all the debts thus assigned must be held to have been extinguished by payments from his assets, or on his account. The only alternative would be to hold that Leighton even then retained the right of affirming or rejecting, thus leav-

ing him at his option to play fast and loose with reference to proceedings in bankruptcy, which, of course, could not be permitted. Therefore, according to the settled practice in bankruptcy, those debts are not to be counted in computing the outstanding creditors with reference to the number required to unite in an involuntary petition. Bump's Bankruptcy (10th Ed.) 439. This, of course, would not prevent these creditors from surrendering, after an adjudication in bankruptcy, the case received by them as unlawful preferences, and from proving their debts. *Neither, according to the well-settled practice in bankruptcy* (Bump's Bankruptcy (10th Ed.) 439), *would it prevent them from uniting in an involuntary petition, and counting as creditors accordingly, unless the petition was based on preferences given them.*

* * * * * * *

The eight claims which were, by Martin's procurement, assigned to different persons who paid no consideration therefor, are also subject to further observations which easily dispose of them. Unless regarded as discharged from the assigned assets of Leighton in the manner we have stated, they belonged in equity to Martin; and the interests of the several persons to whom they were nominally assigned were unsubstantial, and not cognizable in bankruptcy proceedings, which, as we have several times held, are governed by equitable rules. It is the settled practice in the United States in bankruptcy that choses in action which have been assigned before a petition is filed are to be proved by the assignee as being the substantial party in interest. * * *" (Emphasis ours).

This case is an authority for respondent.

We deem further citation of authorities and argument unnecessary; under the statute and the decisions it is clear the respondent had more than 12 creditors and since none joined the Committee's intervening petition, it was properly dismissed.

(B) Interveners are not creditors of respondent.

The allegation in the Committee's second amended petition respecting respondent's employment by the Committee is as follows (31):

> "During the two years next preceding the period herein next mentioned, the said Durward Belmont Luther was employed by your petitioners to inspect all lands located within said Grand River Drainage District and report to your petitioners in respect to the value thereof. During the period between the 1st day of July, 1935, and November 24, 1943, the said Durward Belmont Luther was employed by your petitioners as their Field Agent, to acquire in their behalf from time to time tracts of land in said Grand River Drainage District at foreclosure sales of the drainage tax liens securing the bonds held by your petitioners; *to ascertain from time to time the market value of lands so acquired and to report such values to your petitioners; to ascertain from time to time the highest and best prices at which he could sell said lands for your petitioners;* to develop sales therefor and recommend to your petitioners, based upon his knowledge of such highest and best prices, as to acceptance or rejection by your petitioners of offers to purchase said lands resulting from his said efforts; to negotiate and consummate sales of said lands at the highest and best prices obtainable; and to collect for and on behalf of your petitioners and pay over to them the proceeds in cash and notes of such sales, and otherwise to act for your petitioners in the liquidation of said lands" (Emphasis ours).

Accordingly, it was respondent's duty to obtain offers for the purchase of these lands and submit the offers to the Committee in the form of proposals to purchase, setting forth the amount the purchaser would pay. Respondent did not know the amount for which the Committee would sell the properties and at no time ever

named a figure. The interveners voluntarily offered to buy and voluntarily named the price they would pay without any previous statement from respondent concerning the price. These proposals were in the form of a contract of purchase and sale between the Committee and the purchaser and were to be signed by the proposed purchaser in triplicate and forwarded to the Committee. If accepted they were to be signed by the Committee, thereby becoming a written contract. One copy was to be retained by the purchaser, one by the Committee and one by respondent. Following this custom each of the interveners signed separate proposals which provided that even though they were signed by the proposed purchaser they were not binding on the Committee until approved and signed by the Committee. Intervener Culling offered to pay $1,485, Schaffner $940 and Barnhart $840 as the respective purchase prices for the lands they wanted to buy. A copy of the contract purporting to be approved and signed by the Committee was delivered to each Intervener. Thereafter, each Intervener paid to respondent in cash, or in cash and notes, the amount he had offered to pay, as the purchase price, and received a deed conveying to him the land he had purchased—*the title to which he still retains and has never been questioned.*

Interveners, in their affidavits filed in this proceeding (85, 111 and 135) state that on October 9, 1944, they were shown by the Committee copies of contracts purporting to be signed by each Intervener and the Committee, that they were not the same as the contracts which were previously returned to each Intervener by respondent. The difference being that in the contracts shown to Interveners by the Committee on October 9, 1944, the purchase price was less than the purchase price proposed to be paid by Interveners and set out in the contracts

and proposals to purchase, submitted by Interveners to the Committee, and less than the price actually paid by Interveners to respondent.

The court's attention is called to the fourth claim in the Committee's second amended petition and Exhibit "D" (42) attached to that petition. This claim alleges a debt due the Committee from respondent amounting to $15,819 arising from sales made by respondent similar to the sales made to Interveners. In Exhibit "D" are set out twelve different sales made by respondent which the Committee states were made at prices in excess of the amounts reported to the Committee, the difference, the Committee claims, was retained by respondent and the Committee claims respondent is indebted to it for that alleged difference.

The Committee sets forth in this claim the same method of making sales as is now claimed by Interveners. If respondent is the debtor of the Committee (which we deny) for the difference between the amounts reported to the Committee as received by him, and the amounts actually received by him, he likewise is indebted to the Committee on the sales to Interveners for the amounts he received above the amounts alleged to have been reported to the Committee. Learned counsel representing the Interveners are also counsel for the Committee and it is strange they would assume such inconsistent positions on claims concededly in the same class.

Briefly, the claim made by the Interveners is that Interveners were led by respondent to believe that the Committee had accepted the prices Interveners offered to pay for the lands which Interveners desired to purchase and which prices were stated in the written proposals of purchase made by Interveners to the Committee, being the amounts which Interveners did pay for such

lands; that Interveners learned, on October 9, 1944, that the Committee might have sold said lands to Interveners for a smaller amount than they paid. They contend that respondent is indebted to them for the difference between the amounts they offered to pay and did pay, and the lesser amounts which they have learned the Committee might have accepted.

In the affidavits filed by Interveners *it appears conclusively that Interveners voluntarily offered to buy lands and voluntarily named the purchase price they would pay therefor;* thereupon purchase contracts in triplicate were drawn in which the purchase price named by Interveners was set forth, these three copies of the contract were signed by Interveners. The contracts specifically state that the signing of the contracts by the proposed purchasers does not bind the vendors, that the Committee was not bound in any way until and unless they accepted the offer made by the proposed purchasers.

It thus clearly appears that no representation as to the amount of the sale price was made by respondent. It also appears that Interveners were willing to pay as the purchase price the amounts they offered.

It is significant that neither the Committee nor the Interveners are seeking to rescind the sales. Both appear to be satisfied with the deals they made.

Respondent owed no duty to advise the Interveners that the Committee would accept less than the Interveners had offered; had he done so he would have violated his legal duty to his principal and would have been liable to his principal for its loss.

> "If a broker employed to sell property who falsely understates to the principal the best price or terms obtainable; the principal may recover from him the difference between that obtained and that

which might have been obtained." 9 C. J., Sec. 38, p. 537 (cases cited in Note 30); 12 C. J. S., Sec. 41, p. 99 (cases cited in Note 64, p. 99).

The contention of the petitioning creditor and Interveners necessarily is that the Interveners were entitled to purchase the real estate at the lowest price the Committee would take; that the Interveners were defrauded because respondent should have told Interveners that the Committee was willing to accept a lower amount than that offered by Interveners; and that respondent is liable for the difference to the Interveners.

This contention is not supported by the decisions.

A recovery was denied to the purchaser in the case of *McLennan* v. *Investment Exch. Co.*, (1913) 170 Mo. App. 389, 156 S. W. 730, wherein it appeared that the real estate brokers, learning that a purchaser would pay $12,000 for certain property, obtained a contract from the vendor for the land at a price of $11,500. After securing this contract they returned to the purchaser, and, still claiming to be the agents of the vendor, represented that the lowest price their principal would put on the farm was $13,005. The sale was eventually closed for $12,928.50. It was held that the fraud, if any, was against the principal, since the brokers were acting for the vendor, and not for the purchaser. It was said further that since the plaintiff's testimony showed that he purchased the farm at his own price for less than it was worth, no damage resulted to him by the broker's actions. The court said:

> "Under the rule of *caveat emptor*, which recognizes the parties to a sale as business antagonists dealing at arm's length, the purchaser has a right to buy at as low price as his skill will secure, and the vendor has the corresponding right to sell at the best price he can obtain. Neither has the legal right to the

other's best price, and therefore the representation of either that he has made his best offer cannot be said to be a representation of a material fact. To say otherwise would be to impose a restriction of the right of persons to make their own bargains. We agree with plaintiff that defendants in law and in fact were the agents of Elebracht in the transaction. The trick by which they pretended to purchase the property themselves was nugatory as to their principal. The law would not permit them to do such violence to the trust and confidence their principal had reposed in them. *Therefore, the representations they made to plaintiff were the representations of their principal, and as they did not relate to a material fact and did not damage plaintiff, he has no cause of action*" (Emphasis ours).

The facts in the instant case are more persuasive than those in the *McLennan* case because here respondent made no representation concerning the "lowest or best price" which the committee would take, but on the contrary each intervener voluntarily named the price he would pay and did pay for the land. Therefore, the question as to whether or not there was a misrepresentation of the petitioners' lowest or best price is not involved in this case.

In *R. Harris & Co.* v. *Weller,* 280 Fed. 980, the court stated, l. c. 987:

"* * * Certainly the agent was entitled to do what his principal could have done, namely, obtain the highest price the purchaser could be induced to pay, and such is the law. *McLennan* v. *Exchange Co.,* 170 Mo. App. 389, 156 S. W. 730; *Ripy* v. *Cronan,* 131 Ky. 631, 639, 640, 115 S. W. 791, 21 L. R. A. (N. S.) 305. In the case last cited the court, after directing attention to the fact that no obligation to buy rested upon the purchaser, said:

> *'If the law were as contended for by appellant, then every vendee of property could escape the obligation of his contract, just so he afterwards established the fact that at the time of the sale the vendor or the agent representing him was willing to take less than he represented that he would take for the property disposed of.* This would impose no duty on the purchaser. The validity of his purchase would depend, not upon what he was willing to pay, but upon the price at which the property might be purchased' " (Emphasis ours).

Petitioners contend that the opinion is contrary to the Missouri law and that the rule in the *McLennan case, supra,* has been modified by *Hack* v. *Crain,* (Mo. Sup.) 1915, 177 S. W. 587; *Hays* v. *Smith,* (Mo. Sup.) 213 S. W. 451, and *McClure* v. *H. R. Ennis R. E. and Investment Co.,* (K. C. Court of Appeals) 1925, 219 Mo. App. 112, 268 S. W. 675.

These cases hold in effect that an action for fraud and deceit can be brought against a dishonest agent for a positive misrepresentation of his authorized sales price or of a material fact, but do not support any right of action other than one in tort for fraud and deceit. In the *Hack case, supra,* the court said:

> "The petition proceeds upon the theory that plaintiff was ignorant of the character of the soil and the value of the land purchased, and that defendant knew those facts, and that, after plaintiff informed defendant thereof and told thim that he was going to rely upon his judgment as to the character and value of the land, then, under the facts and circumstances stated in the petition, which were fully proven by the evidence, the conduct of the defendant clearly constituted such a deception and fraud upon the plaintiff as to entitle him to the relief prayed, regardless

of the question as to whether or not he had also perpetrated a fraud upon the vendor of the land."

The case is clearly not in point. Respondent here made no representations whatsoever as to "the character of the soil and the value of the land purchased."

The *Hays case, supra,* approves the general principles announced in the *McLennan* decision, *supra,* and cites it with approval on the point of an alleged misrepresentation of the seller's best price as follows:

> "Appellant complains of defendants' instruction numbered 2, which reads as follows:
>
> > 'The court instructs the jury that it stands conceded that defendants (Smith and Catron) told plaintiff (Hays) that they were Akeman's agents, and you are instructed that any statement by defendants, or either of them, that the least Akeman would take for the land was $75 per acre, does not alone constitute fraud, and the jury cannot find such statement, if made, fraudulent, or base any verdict for plaintiff thereon.'
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> * * * * * * *
>
> It is manifest from the foregoing that plaintiff 'knew' defendants were representing Akeman in the land deal, 'and that he was representing himself.' Plaintiff was dealing at arm's length with Akeman's agents. * * * *McLennan* v. *Exchange Co.*, 170 Mo. App. 389, 156 S. W. 730. * * * Defendants did not assume to act for plaintiff at any stage of the proceedings, but, on the contrary, were representing his adversary.
>
> Keeping in mind the petition herein, as well as the facts aforesaid, we are of the opinion that the trial court committed no error in giving the above instruction."

Nor is the *McClure case, supra,* in point. In that case there was no representation by the agent of the seller's

best or lowest selling price. There the agent misrepresented to the purchaser that he had an option to purchase the land which would expire on a certain date and that unless the purchaser signed the contract of purchase on that date the option would be lost. These misrepresentations, so the court stated, were the inducing causes of the purchaser signing the contract and paying the earnest money.

Petitioners have cited *In re International Match Corp.*, (C. C. A. 2, 1934) 69 F. 2d 73, 75. There the controversy was between the principal and its agent. The case holds that the principal may have a provable claim against its agent for unjust enrichment even though the principal had previously sued its agent for conversion. It is no authority for interveners' contention that they have provable claims for unjust enrichment or in *quasi* contract against respondent.

We have examined the other cases cited for petitioners, and as stated by Judge Woodrough in the Court of Appeals' opinion in this case (225)—"We are not persuaded that the facts shown in respect to their purchases of land from the Committee through its trustee-agent gave rise to any contract or quasi contract obligation on the part of the agent to divert his unjust enrichment from the Committee (to which he was bound to account for it) to the purchasers. The Committee never assigned or relinquished its rights to the purchasers."

The petitioners apparently realized that a claim in tort for damages for deceit or fraud (all of which is denied by respondent) would not constitute a provable claim, fixed as to liability and liquidated as to amount and, therefore, have attempted to create claims for unjust enrichment in interveners and thereby obtain the requisite number of petitioning creditors. These claims, if they exist (and respondent denies their existence), should

have been included in the "4th claim" of the committee's petition where 12 other similar claims are listed. Respondent filed a list of 22 *bona fide* unsecured creditors who were notified and given an opportunity to join with the committee's involuntary petition. Not one of them joined in the action. The conclusion, therefore, is inescapable, *that no one wants respondent declared bankrupt except the committee.* If the committee has a *bona fide* claim against respondent the matter can be tried out in the State Court. There is no occasion to have respondent declared bankrupt, particularly when the pleadings and evidence adduced so far show that he is not insolvent.

(C) There never has been a valid petition in bankruptcy on file or a valid proceeding in bankruptcy in which interventions could be filed.

A person seeking to intervene in litigation takes the litigation as he finds it. The petition in bankruptcy filed by the Committee does not support a bankruptcy proceeding in its true sense. The general purpose of a bankruptcy proceeding is to preserve and to distribute the assets of the bankrupt for the benefit of all his creditors. Not so with the case before the court. The petitioning creditors are interested solely in themselves and in their own alleged claim. The creditors have adopted the expedient of attempting to substitute a bankruptcy proceeding for an ordinary suit at law.

The petitioning creditors in the first instance filed a petition in which it was alleged that the number of creditors of the respondent were less than twelve when in truth and fact there were more than twelve. This questionable practice has become too common. It is a well-known fact that few persons are able to withstand the impact of an involuntary petition in bankruptcy and that petitioning

creditors file the petition with the hope of a consent to adjudication. The petitioning creditors in this case persisted in this method of attack long after a verified list of the respondent's creditors was filed in court showing that there were more than twelve in number. This practice was characterized in the case of *Navison Shoe Company* v. *Lane Shoe Company,* 36 F. 2d 454, 459, as "a fraudulent attempt to confer jurisdiction upon the court where none existed." If, therefore, the petition in this case was filed either with knowledge on the part of the petitioners that the allegation of less than twelve creditors was false or if the allegation was recklessly made not caring whether the allegation which the Committee affirmed as of its own knowledge to be true was true or false, the petition was a fraud upon the court and conferred no jurisdiction upon the court. The court's jurisdiction having been imposed upon in the first instance and this imposition is accentuated by filing two amended petitions containing the same allegations, there is no proceeding before the court to which the Interveners would be entitled to join.

The interventions are not petitions in bankruptcy upon which an adjudication could be made but merely an attempt to assert a claim. In *Despres et al.* v. *Galbraith,* 213 Fed. 190, 193 (C. C. A. 8):

> "We are of opinion that the petition of February 1, 1912, was void for the want of proper petitioners. That being true, the intervening petition could draw no support from it. The rule is clearly stated by the court in *Robinson* v. *Hanway,* Fed. Cas. No. 11953, as follows:
>
> > 'But we are of opinion that the original creditors' petition is void for want of proper petitioners, and did not give the court jurisdiction of the case, and that the intervening petitions are also void for want of an original petition to give

them force. It is not a case of amendment of a defective petition of which the court has jurisdiction, and when the interveners perfect the petition by additional numbers and amounts. But it is an attempt to give life to a dead petition, to ingraft branches upon a lifeless stock, and infuse vitality into it. The interveners must draw their support, if at all, from the original petition; but in this case the original petition is dead, and neither supports the interveners nor itself.' "

On October 4, 1944, the referee entered his order dismissing the petition. This is in accordance with Section 59(d) of the Bankruptcy Act which provides that if, after notice has been given, a sufficient number of qualified creditors have not joined in the petition, the case shall be dismissed. There is no provision in the Bankruptcy Act whereby after the order of dismissal the proceeding can be kept alive for the purpose of receiving intervening petitions. At no place in the Bankruptcy Act is it even suggested that the proceedings may be kept alive by the expedient of filing a motion for a new trial.

In addition to this, there are equitable reasons why the interventions should be denied. The Committee in its motion for a new trial (61, Par. c) rather brazenly states that it was deprived of its right to negotiate and solicit the Interveners to join in this petition. We are aware of the fact that in some bankruptcy cases District Courts have stated that the petitioners may solicit others to join with them in the petition but we doubt very mcuh if any court would extend this to the point where it resulted in the stirring up of litigation where none existed before. Whatever the rule may be elsewhere, it is contrary to the public policy of the State of Missouri and has been denounced and made a misdemeanor by Sec. 4320, R. S. Mo., 1939.

It is interesting to note that the same attorneys appear as attorneys for the Committee and for the Interveners and that the intervening petitions (66, 69, 76) are verified by the chief counsel for the Committee. It becomes apparent, therefore, that this entire proceeding was conceived by the Committee and that Committee is responsible for the solicitation and the filing of the tenuous claims of the Interveners.

The paucity of the petition in bankruptcy is demonstrated by the allegations of acts of bankruptcy. These are a conveyance of certain land in Chillicothe, Missouri (8), which was an estate by the entirety (15, 19, 208) and which under the law of Missouri could not have been the subject of a fraudulent conveyance and hence an act of bankruptcy. *Stifels Union Brewery* v. *Saxy*, 273 Mo. 159. The other alleged act of bankruptcy was the payment of three thousand dollars to respondent's wife (8). This payment was made in pursuance to a property settlement and was for a present consideration (15, 19, 23, 24, 208). Respondent received deeds extinguishing his wife's interest in lands and personal property in Missouri and Texas and was relieved of further obligation to support his wife. By no stretch of imagination could such a transaction be determined a preference within the meaning of 60(a) of the Bankruptcy Act. There can be no preference where there is an adequate present consideration (*In re Pusey*, 37 Fed. Supp. 316, 323).

All these transactions were a matter of public record in Livingston County, Missouri, long prior to the filing of the petition in bankruptcy, and appellants are charged with knowledge thereof.

Subsequent to the filing of the petition in bankruptcy, the Committee attempted to give new life to the proceeding by alleging two additional acts in bankruptcy: One, the concealment of $55,000 which is couched in such indefinite language as to time, place and amount that it

does not rise to the dignity of a proper allegation of an act of bankruptcy; and the other of a payment of $80 to Owens. How a man who has assets aggregating $193,400 (27) could prefer a creditor by paying him eighty dollars does not appear.

The respondent has consistently denied the charges of fraud and acts of bankruptcy (11, 42). He has alleged his solvency. He alleges that he owes the Committee nothing. He recites a course of intimidation pursued by the Committee and an invitation to the Committee to test any claim it may have against him by a suit at law (44). His assets are in his own name (27).

This proceeding is clearly a perversion of the processes of bankruptcy to force a settlement.

CONCLUSION.

The writ of certiorari is only to be granted under exceptional circumstances, and certainly this is not a case to invoke the court's discretionary power. It is not a case of general or public interest; it is not a case in which any novel principles of law have been declared; it is not a case involving conflicts between different circuits; and it is not a case in which state law has been misapplied.

We respectfully submit that the petition for the writ of certiorari should be denied.

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